

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of:

Newspaper/Radio Cross-Ownership
Waiver Policy

MM Docket No. 96-197

To: The Commission

REPLY COMMENTS OF TRIBUNE COMPANY

TRIBUNE COMPANY

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Tribune Company ("Tribune"), on behalf of its ten television stations, five radio stations and four daily newspapers, hereby files this reply to the comments submitted in response to the Commission's Notice of Inquiry ("Notice"), FCC 96-381, released October 1, 1996.¹ The Notice generally sought comment on a possible liberalization of the Commission's waiver policy relating to part of the daily newspaper cross-ownership rule, codified at 47 C.F.R. § 73.3555(d). Although Tribune is a member of the Newspaper Association of America ("NAA") and fully

¹ Tribune's wholly-owned television stations include: WGN-TV, Channel 9, Chicago, IL; KTLA(TV), Channel 5, Los Angeles, CA; WPIX(TV), Channel 11, New York, NY; WGNX(TV), Channel 36, Atlanta, GA; WLVI-TV, Channel 56, Cambridge, MA; KWGN-TV, Channel 2, Denver, CO; KHTV-TV, Channel 39, Houston, TX; WGNO(TV), Channel 26, New Orleans, LA; WPHL-TV, Channel 17, Philadelphia, PA and KSWB-TV, Channel 69, San Diego, CA. Tribune is also the publisher of the following daily newspapers: The Chicago Tribune, The Orlando Sentinel, The Sun-Sentinel (in the greater Miami, Florida area) and The Daily Press in Newport News, Virginia. Tribune also owns, through subsidiaries, WGN(AM), Chicago, IL; WQCD(FM), New York, NY; KKHK(FM) and KOSI(FM), Denver, CO and KEZW(AM), Aurora, CO.

supports NAA's comments in this proceeding, Tribune has identified a number of issues that require separate emphasis or comment.

I. INTRODUCTION AND SUMMARY

Tribune, like many commentators in this proceeding, submits that today's mass media marketplace, with its ever burgeoning sources of diversity and multi-faceted competition, requires that the Commission, at a minimum, substantially expand the waiver policy applicable to the entire rule. As demonstrated more fully below, changes in the mass media marketplace over the last twenty years undermine whatever basis there originally was for a strict application of the rule. More importantly, the waiver policy must be substantially revised to remove the arbitrary and unfair limitation it places on the ability of companies who own newspapers to compete in today's mass media marketplace.

Tribune's reply comments next argue that there is no principled basis to exclude consideration of television stations in this proceeding. Recent Court of Appeals decisions strongly suggest that the Commission has an obligation to consider revising the rule in its entirety given the dramatic changes in the marketplace since the rule was adopted. Finally, without in any way undermining its support for a relaxation of the waiver policy applicable to both radio and television stations, Tribune

submits that the Commission should adopt a simple, easy-to-administer waiver policy for radio-newspaper combinations that properly accounts for all the sources of diversity in local markets.

**II. THE COMMISSION CAN NO LONGER IGNORE MARKET CHANGES --
CHANGES THAT MAKE THE RULE ESPECIALLY PUNITIVE TO NEWSPAPER
OWNERS**

Tribune agrees with the majority of commentors in this proceeding who support, at the very least, a substantially expanded waiver process for the entire rule.² The Commission simply can no longer ignore the sea change in market conditions from those that existed at the time the rule was adopted. As the NAA recognized, "daily newspaper publishers and over-the-air broadcasters compete today in a technologically advanced and highly diverse marketplace for information, opinion, entertainment and advertising that was unimaginable when the Commission determined, more than twenty years ago, to foreclose

² See Comments of: Journal Broadcast Group, Inc. at 9-10; Lexington Herald-Leader at 2 ("urg[ing] ... relax[ation] [of] the restrictions on cross-ownership of newspapers and broadcast entities in the same market."); Malrite Communications, Inc. at 3; National Association of Broadcasters at 1-2; Gannett Co., Inc. at 4; National Newspaper Association at 8; Donrey at 2 (urging for repeal of newspaper/broadcast cross-ownership rules "in their entirety."); Cox Enterprises, Inc and Media General, Inc. at 1-2 ("In today's environment of extraordinary media diversity and cutthroat competition, the rule's restrictions distort" the

future newspaper/broadcaster cross-ownership." Comments of NAA at 26-27.³

More importantly, Tribune submits that these changed market conditions have made the rule more and more punitive to newspaper owners. The NAA put it succinctly: "[t]he meteoric rise in the number and variety of available voices in today's information marketplace . . . compels the Commission to reevaluate this outmoded regulatory policy, which continues to single out newspaper publishers as ineligible -- as a class -- to hold licenses for broadcast stations in their local markets." Comments of NAA at 35.⁴ As one commentor acknowledged, these market changes have by themselves adversely affected the competitive position of newspapers:

³ The NAA also properly observed that: "[t]he 'hoped for gain in diversity' that was the sole premise for adoption of the newspaper/broadcast cross-ownership prohibition in 1975 unquestionably has been achieved, not through governmental action, but through the technological revolution of the past two decades and the explosive growth in competition in the mass media marketplace." Comments of Newspaper Association of America at 8.

⁴ The NAA also observed that "[b]oth newspaper publishers and broadcast station licensees face intense and ever-increasing competition from a rapidly expanding array of information providers, virtually all of which are free to operate on a 'multi-channel' basis without governmental constraints on common ownership." Comments of Newspaper Association of America at 1-2; see also Comments of: Pulitzer Publishing Company at 6 (citing the proliferation of other forms of "core media" relative to the growth of newspapers, "making cross-ownership of less concern."); Reading Eagle Company at 4; Journal Broadcast Group, Inc. at 8; ABC, Inc. at 7-10; Donrey Media Group at 1; Gannett Co., Inc. at 3; National Association of Broadcasters at 1 ("[t]he explosion of media choices" provides good cause for review of the application of the cross-ownership prohibition); Cox Enterprises, Inc and Media General, Inc. at 6 (discussing the transformation of the media market place and the decline of the newspaper industry).

the mercurial nature of technology and the ever increasing need to serve consumers have transformed the media marketplace of a generation ago into an expansive area of informational and entertainment choices which has already begun to displace the traditional daily newspaper as the primary source of information.

Comments of Malrite Communications, Inc. at 3. The Notice that commenced this very proceeding recognized the results of these changed market conditions. Since the adoption of the daily newspaper cross-ownership rule in 1975, the number of radio stations has increased from 8,265 to 12,076 (approximately a 46 percent increase) while the number of English language daily newspapers has decreased from 1,756 to 1,556 (a decline of 11 percent). Notice ¶ 9.

Indeed, Chairman Hundt has recognized that the combination of changed market conditions and the restrictive limitations of this rule have adversely affected the newspaper industry:

Although Congress has given us the option of waiting until 1998 to review ownership rules not currently the subject of Commission proceedings, there is no reason to wait -- especially when there is reason to believe that at least one of those rules, the newspaper-broadcast cross-ownership rule, is right now impairing the future prospects of an important national source of education and information: the newspaper industry.

Capital Cities/ABC, Inc., 11 FCC Rcd. 5841, 5906 (1996)

(separate statement of Chairman Hundt). In light of the dramatic changes in the mass media marketplace and the adverse effect these changes have had on the newspaper business in combination with the rule, Tribune submits that the Commission should, at the

very least, substantially liberalize its waiver policy for all proposed newspaper broadcast combinations.

III. THE PROCEEDING SHOULD BE EXPANDED TO INCLUDE TELEVISION STATIONS

Tribune submits that there is no principled basis on which to exclude television stations from this proceeding. As noted by one commentor in this proceeding, "the rationales cited by the Commission for reviewing its policies with regard to radio-newspaper combinations apply even more strongly to television." Comments of Knight-Ridder at 2.

For example, while the number of daily newspapers has declined, the number of television stations (like the number of radio stations) has increased dramatically since the daily newspaper cross-ownership rule was originally adopted, from 952 to 1,544 (an increase of 62 percent).⁵ This increase, combined with the explosive growth in the cable industry as well as other alternative distributors of video programming, strongly suggests that the changes in the media marketplace support a reexamination of the rule as it applies to newspaper-television combinations as well.

⁵ 1996 Broadcasting & Cable Yearbook at C-244; see Broadcast Station Totals as of December 31, 1996, FCC Public Notice, released January 21, 1997.

While the Notice of Inquiry indicates that this proceeding keeps the "promise" the Commission made when it considered the merger of The Walt Disney Company ("Disney") and Capital Cities/ABC, Inc. in February 1996, Notice ¶ 1, none of the language in the Commission's Memorandum Opinion & Order promising this proceeding was limited to a consideration of radio-newspaper combinations. For example, in summarizing its action on Disney's request for two permanent waivers of the daily newspaper cross-ownership rule, the Commission noted that "[w]hile we decline to depart from precedent in this restricted adjudication, we will proceed expeditiously with an open proceeding to consider revising our newspaper broadcast cross-ownership policies." Capital Cities/ABC, Inc., 11 FCC Rcd. at 5851 (emphasis added).

Similarly, in his separate statement in Disney-CapCities, Chairman Hundt observed: "[o]ur current strict prohibition on newspaper-broadcast cross-ownership, which also may be unnecessarily denying broadcasters revenue they could put to good use, needs review and probably needs significant revision. The Commission today quite rightly commits to conduct, and to complete expeditiously, an open proceeding to modify its newspaper-broadcast cross-ownership policies as necessary." Id. at 5906 (separate statement of Chairman Hundt) (emphasis added). Tribune submits that implicit in these promises of a broader review of the daily-newspaper cross-ownership rule was the recognition that the veritable explosion of media outlets,

competition and diversity in today's media market -- an expansion recognized in virtually all the comments submitted in this proceeding -- requires a reevaluation of the entire rule rather than just the radio-newspaper subset.

Indeed, Tribune submits that given these dramatic changes in the mass media marketplace, the Commission is required to conduct a review of the entire rule in this proceeding. In Cincinnati Bell Telephone Co. v. FCC, 69 F.3d 752, 767-68 (6th Cir. 1995), the Sixth Circuit remanded the Commission's Personal Communications Service ("PCS") rules and rejected a Commission argument that "agencies ordinarily may proceed one step at a time when addressing large, complicated issues." 69 F.3d at 767. The court rejected this argument, holding that "where factual assumptions which support an agency rule are no longer valid," a fact recognized by the overwhelming majority of commentators in this proceeding as well, "agencies ordinarily must reexamine their approach." Id. (citing Bechtel v. FCC, 957 F.2d 873 (D.C. Cir.), cert. denied, 113 S. Ct. 57 (1992)).⁶

Moreover, notwithstanding the suggestion to the contrary in the Notice, there is no basis in this record, or in the record of the ongoing television ownership proceedings, to

⁶ In Cincinnati Bell, the Sixth Circuit ruled that while the Commission is normally "not required to address every possible issue in one proceeding," the disparate treatment in its rules of similarly situated entities in an "industry [that] is exploding and changing almost daily" was arbitrary and capricious. Id.

distinguish between radio and television stations on the basis that television stations, unlike radio stations, "do appear to compete with newspapers in the advertising market." Notice, ¶ 15. On the contrary, the Commission's tentative conclusion in the television ownership proceeding, a conclusion it did not revise in its recently released Second Further Notice of Proposed Rule Making in that proceeding, was that "the local advertising markets [] include video advertising, radio advertising and newspaper advertising." In re: Review of the Commission's Regulations Governing Television Broadcasting, Further Notice of Proposed Rule Making ("Television FNPRM") 10 FCC Rcd. 3524, 3543 (1995).

Indeed, the Commission's tentative conclusion fail to recognize the broader competitive environment that newspapers face, as was concluded in an FCC staff review of the issue some years earlier and in two major economic studies submitted in response to the Television FNPRM. Following a comprehensive evaluation of competition in the television industry from 1975 to 1990, an Office of Plans and Policy working paper concluded that "[a]dvertising alternatives to the video market include radio, newspapers, magazines, direct mail, yellow pages, and outdoor advertising." Broadcast Television in Multichannel Marketplace, 6 FCC Rcd. 3996, 4083 (1991) (Office of Plans and Policy Working Paper Number 26).

This broader advertising product market was also supported in two major economic studies submitted to the Commission in response to the Television FNPRM. An economic study submitted by the Local Station Ownership Coalition found ample evidence of cross-elasticities of demand between alternative advertising media to support the conclusion that the relevant market for local advertising includes both electronic media, e.g., radio, broadcast and cable television, and nonelectronic media, e.g., direct mail, newspapers, magazines, yellow pages and outdoor billboards.⁷

Similarly, an economic study submitted jointly by the three established networks (ABC, CBS, NBC) and Westinghouse prepared by Economists Incorporated concluded that the local advertising product market tentatively adopted by the Commission in the Television NPRM "is too narrow."⁸ The study cited empirical evidence that demonstrated "that other forms of advertising, such as yellow pages, outdoor and direct mail, are substitutes for video, radio and newspaper advertising."⁹ Most

⁷ National Economic Research Associates ("NERA"), "Regulating Television Stations Acquisitions: An Economic Assessment of the Duopoly Rule," May 17, 1995, at 2 (submitted with the Comments of the Local Station Ownership Coalition in MM Docket No. 91-221).

⁸ Economists Incorporated, "An Economic Analysis of the Broadcast Television National Ownership, Local Ownership and Radio Cross-Ownership Rules," May 17, 1995, at 23 (comments submitted jointly by CBS, NBC, ABC and Westinghouse in MM Docket No. 91-221).

⁹ Id. The study concluded that "there is no evidence to support a conclusion that other forms of advertising -- including yellow
(continued...)

importantly for this proceeding, however, was the reference in the Economists Incorporated study to "persuasive evidence that radio and print advertising are substitutes for video advertising."¹⁰

Thus, Tribune submits that there is no principled basis for the Commission to exclude television stations from this proceeding. The long period of time since it originally adopted the rule and the profound changes in the marketplace that have occurred during this period combine to remove the Commission's discretion to consider this rule one broadcast medium at a time. Indeed, the very Commission decision that prompted this proceeding implicitly acknowledged that a review of the entire rule (including by definition a consideration of television stations) was warranted in light of the changes that have occurred since the rule was adopted.

IV. THE COMMISSION SHOULD ADOPT A LIBERAL, EASY-TO-APPLY WAIVER STANDARD FOR RADIO-NEWSPAPER COMBINATIONS

In response to the questions raised by the Commission in the Notice, Tribune, like many of the commentators, supports a presumptive waiver standard for proposed radio-newspaper combinations based on a simple and straightforward "minimum

⁹ (...continued)
pages, outdoor and direct mail -- do not constrain the prices of video, radio and newspaper advertising." Id. at 24.

¹⁰ Id. at 23.

number of voices test." Such a standard would be easy to administer and predictable for participants in the industry. Tribune also agrees with those commentators who argue that this minimum voices test should be applied without reference to the market's size and without any attempt to evaluate the strength of a particular voice. Finally, Tribune opposes any required additional public interest showing under any presumptive waiver standard adopted for proposed newspaper-radio combinations.

While generally supportive of a 30 voices minimum standard, Tribune believes the appropriate minimum number depends crucially on how the Commission counts voices in the market. The Commission should recognize both broadcast and non-broadcast outlets that contribute to local diversity.¹¹ Moreover, the Commission should focus on diversity and leave primary consideration of the competitive effects of a proposed combination to the Department of Justice and Federal Trade Commission. Tribune supports such an approach, like several of the commentators.¹²

¹¹ As Malrite Communications, Inc. argued:

[i]f a particular media source has the potential to reach a consumer, it should be considered a diversity enhancing source of information and/or entertainment. To fail to consider the full latitude of . . . media . . . is to reject real world forces and the benevolent advance of technology as the 20th century draws to a close.

Comments of Malrite Communications at 6.

¹² As Cox and Media General noted: "The Department of Justice ["DOJ"] and the Federal Trade Commission have principal and
(continued...)

Like the NAA, Cox, Media General and ABC, Tribune supports the inclusion of commercial and non-commercial television and radio stations in any diversity analysis. Comments of NAA at 48; Joint Comments of Cox and Media General at 12. Tribune wholeheartedly agrees with Cox and Media General in opposing any proposal to exclude certain television or radio stations in counting the number of voices in a particular market: "[t]elelevision as well as radio stations should be counted: it would be completely illogical to retain television/newspaper and radio/television cross-ownership restrictions while excluding them from voices that add to diversity and competition." Joint Comments of Cox Enterprises, Inc. and Media General, Inc. at i.

Like the NAA and ABC, Tribune also supports the inclusion of daily and weekly newspapers in the diversity analysis. Comments of NAA at 48; Comments of ABC at 26. Unlike the NAA, Cox and Media General, however, Tribune opposes the suggestion that a cable system should be counted as only one voice in the analysis. Tribune submits that all basic cable channels available in the geographic market, with the exception of so-called shopping channels, should be counted as separate voices in the analysis. The fact that not all households in a

¹² (...continued)
separate federal antitrust enforcement authority in that area. They have not hesitated to exercise it to restrict media ownership." Joint Comments of Cox and Media General at 8; Comments of NAA at 46 n.122 ("NAA submits that the Commission should generally defer to the Department of Justice and the Federal Trade Commission, the expert agencies charged with enforcement of the antitrust law.").

given market subscribe to cable is irrelevant to this analysis, given the nearly universal availability of cable television service in this country.¹³ If the level of local cable penetration is anywhere near the nationwide average, the basic cable channels available in the geographic market clearly compete for local advertising dollars and, as recognized by Chairman Hundt in several speeches in the past year, provide innovative, diversity enhancing programming.

Tribune also agrees with many of the commentators that in assessing the number of voices available for diversity purposes, market rank and "the relative strength of voices is immaterial." See Joint Comments of Cox Enterprises and Media General at 9, 10. Instead, the Commission's analysis should focus "simply on whether a particular source is available to consumers of ideas in the relevant geographic market, should they choose to listen, watch, or read that source. " Comments of NAA at 45. As recognized by ABC:

The rule's central policy is to promote 'the widest possible dissemination of information from diverse and antagonistic sources' -- to maximize the number of competing sources among which the public may select. A standard employed to implement that policy should not discriminate among potentially available sources of information or viewpoints on the basis of their popularity or influence. . . . The essential question, therefore, is whether a given source of relevant information is available to the public in any given area or community, not whether it is popular or influential.

¹³ As Cox and Media General recognized: "[n]ewspapers also charge for their service and are not read in every household, yet the Commission does not consider that a bar to including them among contributors to market diversity." Joint Comments of Cox and Media General at 15-16.

The relative popularity or influence is a matter for choice by the public.

Comments of ABC, Inc. at 25 (footnotes omitted) (emphasis in original).

Tribune submits that the Commission should also clearly articulate a geographic area for evaluating proposed radio-newspaper combinations. Contrary to the implication in the Notice, however, the Commission has never held that a newspaper must have a "significant" level of circulation in a county for that county to be included in the geographic market for waiver analysis. Notice ¶ 14. Neither the FCC's Orders in the rulemaking proceedings adopting the rule nor its subsequent adjudicatory cases addressing possible waivers mention any standard of "significant" circulation.

Indeed, the Commission's two most recent cases addressing potential waivers of the rule discuss only the importance of coverage of issues of local significance and the need to exclude broadcast stations that do not place a contour into communities that are served by the newspaper. See Capital Cities/ABC, Inc., 11 FCC Rcd. 5841, 5888-91 (1996); Hopkins Hall Broadcasting, Inc., 10 FCC Rcd. 9764 (1995). In Capital Cities, the FCC recognized that the most important factor was whether the media addressed "issues important to that receiving community." 11 FCC Rcd. at 5891. In Hopkins Hall, the Commission similarly acknowledged that the key issue was whether the relevant media

"contribute to coverage of issues of local concern . . . , issues that are at the heart of the Commission's concern with diversity." 10 FCC Rcd. at 9766. Accordingly, Tribune submits that the Commission should clearly articulate and explain a geographic market area for the application of the rule. Tribune, like other commentors, submits there is no legitimate basis to define the relevant geographic market for newspaper-radio waiver requests more narrowly than it is defined for the local radio ownership and one-to-a-market rules. See comments of NAA at 51.

Tribune also opposes the imposition of an additional public interest showing in any presumptive waiver standard. Given the level of competition and diversity in today's mass media marketplace, owners of radio-newspaper combinations will, develop and strengthen their local programming efforts in order to compete more effectively. Indeed, in the order adopting the daily newspaper cross-ownership rule, the Commission recognized that newspaper-owned stations did more news, local non-entertainment programming and more overall local programming than did non-newspaper owned licensees.¹⁴ Tribune submits that there is no reason to believe that newspapers -- which are leaders in the use of news content in new media -- will not use their

¹⁴ Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, "Second Report & Order," 50 F.C.C.2d 1046, 1078-81, 1094-98 (Appendix C) (1975), rev'd in part, 555 F.2d 589 (D.C. Cir. 1977), reinstated, 436 U.S. 775 (1978).

newsgathering resources to benefit their local, commonly-owned radio stations.

For these reasons, Tribune urges the Commission not to impose "cookie cutter" local news and public interest obligations on proposed newspaper-radio combinations. Rather, the Commission should rely on competitive forces in the market to develop programming responsive to market needs. Tribune submits that this approach is especially warranted here in light of the Commission's earlier findings about newspaper owners. Moreover, as noted by the NAA, any requirement "of proposed programming or other 'content' benefits to be derived from a proposed transaction could involve the Commission unnecessarily in sensitive areas of editorial discretion that are entitled to substantial deference in view of the First Amendment interest[] at stake." Comments of NAA at 53.

Finally, as the Commission considers the appropriate waiver standard to apply to proposed radio-newspaper combinations, Tribune submits that recent radio consolidations permitted by the Telecommunications Act of 1996 cannot be ignored. Specifically, a single owner can now own up to eight radio stations in a market including, as in the case of Westinghouse, the two major all-news stations in New York, Los Angeles and Chicago. See Schatz, "All News, Almost All Profit, All the Time," New York Times, June 24, 1996, at D7, col. 4 (noting that Westinghouse owns the two major news stations in New

York (WINS-AM and WCBS-AM) as well as in Los Angeles (KNX-AM and KFWB-AM)). Moreover, the Commission recently temporarily approved Westinghouse's ownership of a network affiliated, VHF television station, four AMs (including the two major all-news stations) and three FMs in New York and a network affiliated, VHF television station, 2 AMs (including both major all-news stations) and four FMs in Los Angeles.¹⁵ Given this recent activity and the substantial media assets owned and controlled by a single entity, including the common ownership of the major news radio stations in the three larger markets, Tribune submits that the FCC should similarly relax its waiver standard and permit the common ownership of a newspaper and multiple radio stations in the same market as well. Such a result will be particularly appropriate if the Commission does as it has proposed and eliminates the one-to-a-market rule.

IV. CONCLUSION

Tribune submits that the Commission can no longer ignore the level of competition and diversity in the mass media marketplace today -- a level of competition that one commentator recognized was virtually "unimaginable" at the time the rule was adopted. In conjunction with these market changes, the majority of commentators recognized that the rule has unfairly singled out and limited the ability of companies that own newspapers to

¹⁵ Stockholders of Infinity Broadcasting Corporation, FCC 96-495, released December 26, 1996, ¶ 65.

compete in the mass media marketplace. The Commission should act to remove this artificial limitation by liberalizing the waiver policy applicable to the entire daily newspaper cross-ownership rule.

As an interim step in that process, Tribune supports the addition of television stations to this proceeding. In light of the enormous changes in the market over the past twenty years, the Commission does not have the luxury to address this issue one step at a time. Finally, Tribune supports a liberalized, presumptive waiver standard for proposed radio-newspaper combinations. Such a standard should be simple to administer and properly recognize all the voices, both broadcast and non-broadcast, that contribute to local diversity.

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